The Effectiveness of Labour Provisions in Bilateral Investment Treaties and their Future Potential

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# List of Abbreviations

<table>
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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>BITs</td>
<td>Bilateral Investment Treaties</td>
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<tr>
<td>CAFTA-DR</td>
<td>Dominican Republic- Central America- United States Free Trade Agreement</td>
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<td>FTA</td>
<td>Free Trade Agreement</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>IISD</td>
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<td>International Labour Organization</td>
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<td>NAALC</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<td>TPP</td>
<td>Trans-Pacific Partnership Agreement</td>
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<td>US</td>
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1 Introduction

1.1 Background

Both international investment law and international labour law have in their separate fields shaped international rules of great importance. While labour law appeared on the international arena with the establishment of the International Labour Organisation (ILO) in 1919, the legal framework for international foreign investment did not develop until after World War II.\(^1\) However, during the last two decades a huge increase in the number of Bilateral Investment Treaties (BITs) has taken place. Originally, BITs focused exclusively on the protection of investments, and did therefore not address labour or employment matters at all. The first reference to worker’s fundamental rights appeared in 1994 when the BIT between the United States (US) and Poland entered into force.\(^2\) In the last few years, however, the inclusion of labour provisions in BITs has increased rapidly and of the BITs concluded in 2014 nearly 80 per cent referred to the protection of labour rights.\(^3\)

At the same time, foreign investors have been involved in many instances of labour rights violations when investing abroad, such as the employee suicides at Foxconn plants in China in 2010 and the collapse of the Rana Plaza Building in 2013 that killed more than 1,100 workers and crippled hundreds more.\(^4\) The recent trend to include labour provisions in BITs therefore raises important questions about their efficiency in protecting the rights of workers. Such questions are further raised by the recently decided \textit{US v Guatemala} case,

\(^4\) See more about these events in Nolan, “The relationship of Human Rights to Business” in Nolan and Baumann-Pauly (eds), \textit{Business and Human Rights: From Principles to Practice} (2016) ch 1.1 and 1.4.
concerning alleged violations of the labour provision in the Dominican Republic-
Central America - United States Free Trade Agreement (CAFTA-DR).⁵

Although the historical separation between rules on foreign investments and
labour can still be seen to exist, the development in which BITs have began to
include labour provisions makes the relationship between investments and labour
rights not only interesting but also important to bring under further examination.
The specific purpose of this essay is therefore to analyse how effective labour
provisions in BITs are in protecting workers rights, as well as to suggest how
BITs can be improved in order to provide increased protection for workers. This
analysis furthermore provides an entrée into the question of whether on investors
legally binding labour standards should be included in BITs.

1.2 Method
The sources of law applied in this paper are BITs and case law from different
investment arbitration tribunals. Especially the labour provision in the 2012 US
Model BIT, article 13, will be analysed.⁶ Some Free Trade Agreements (FTAs)
have also been consulted since they proved helpful in guiding the analyses,
especially by containing compared to BITs more far-reaching labour provisions.⁷
While there indeed are differences between international investment law and
international trade law, the reliance on FTAs were yet enabled because of the
similar characteristics and reasoning that exist within the two fields.⁸ When
interpreting provisions in treaties and case law the essay employed the methods
set out in the Vienna Convention on the Law of Treaties (VCLT) since these
methods are also applied by investment arbitration tribunals.⁹ However, because
treaty texts and arbitration decisions are sometimes rather vague, doctrine has
been used to facilitate further understanding of their practical meaning. Doctrine

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⁵ In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1 (a) of the
CAFTA-DR (United States v Guatemala), Panel Decision (14 June 2017).
⁶ 2012 US Model Bilateral Investment Treaty. Hereafter, unless something else is said, whenever the
US Model BIT is mentioned it is the 2012 version that is being referred to.
⁷ See for example the North American Agreement on Labor Cooperation (NAALC).
⁸ Boie, ‘Labour Related Provisions in International Investment Agreements’ (2012) 1-2 and Bolle,
Overview of Labour Enforcement Issues in Free Trade Agreements (2016) 2.
has also been used to bring greater overall understanding for the field of international investment law, necessary in order to enable deeper and more correct analyses. It should furthermore be noticed that the analyses in the essay build upon assumptions that a) an efficient protection for workers is desirable also within international investment law and that b) violations of basic labour rights cannot be defended by appeal to economic considerations. The questions raised are therefore continuously analysed and interpreted through a human rights lens, which of course will affect the argumentation in the analyses and thus also the conclusions drawn.

Due to a strong personal interest for international investment law I have earlier written an essay on the subject. However, the current thesis has been rewritten as well as broadened and the essay at hand thus entails completely new analyses and information not present in earlier work. The greater length of this essay as well as the increased time spent on research has furthermore allowed for deeper analyses to be made, in turn leading to changed and new conclusions. Due to the major changes that have been made in comparison to earlier work, the essay at hand is to regard as independent and the conclusions herein should be seen as representing my final standpoints on the issue.

1.3 Delimitations
Existing literature primarily cover the effects of BITs on human rights. However, this essay does not aim to examine the overall relationship between international investments and human rights, but to exclusively concentrate on labour rights by analysing the efficiency of labour provisions in BITs and how BITs can be improved in order to provide increased protection to workers. The assessment of the efficiency of labour provisions in BITs will be based on an analysis of the labour provision in the 2012 US Model BIT, article 13. Article 13 constitutes an appropriate departure when seeking to determine the efficiency of labour provisions since similar labour provisions can be found in several BITs

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and trade agreements. The argumentation surrounding article 13 is therefore usually applicable to other BITs as well, however the reader should keep in mind that there might of course be instances when this is not the case. The clear focus of the analysis will be on the efficiency of article 13 and similar labour provisions, not on questions of more material nature such as what labour rights that should fall under the scope of labour provisions or what the exact level of labour rights protection should be. Although generally avoiding questions regarding material substance, such considerations are nevertheless sometimes required when providing examples on how labour provisions could be improved for the future.

However, when proceeding to analyse whether on investors legally binding obligations should be included in BITs the essay will not at all elaborate with the material substance of these obligations, but exclusively focus on whether such an inclusion is appropriate within the international investment regime. This is because the material substance of provisions, such as its exact wording, is not a determining factor in the overall assessment of the theoretic appropriateness of including on investors legally binding labour obligations in BITs. Questions of practical feasibility will also fall outside the scope of this analysis since it is not in itself relevant to answer the question of whether investor-obligations should be included in BITs de lege ferenda.

1.4 Outline
This paper will be divided into two parts and six main chapters. The first part of the essay will begin by providing a background to the field of international investment law by introducing its main characteristics. The characteristic features considered are the history of international investment law, the definition of foreign investment, the fractioned system of BITs, the rationales underpinning

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11 See regarding trade agreements, for example, art 16.2.1 in CAFTA-DR and the Trans-Pacific Partnership Agreement (TPP) (not yet in force) art 19.3-5. Regarding BITs, see for example Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement of Reciprocal Protection of Investment art 13 and Treaty between the Government of the United States of America and the Government of the Republic Rwanda Concerning the Encouragement and Reciprocal Protection of Investment art 13.
the conclusion of BITs and the dispute settlement mechanisms of international investment law. A careful analysis of the labour provision found in article 13 in the 2012 US Model BIT then follows, an analysis that furthermore constitutes a basis to the following assessment regarding its effectiveness in protecting labour rights. After assessing the effectiveness of article 13 in the US Model BIT the essay will provide suggestions on how the US Model BIT can be improved in order to provide increased protection to workers from a substantive and procedural perspective. It should furthermore be noticed that the suggestions on improvements in most cases also will be applicable to labour provisions found in BITs other than the 2012 US Model BIT. The second part of the essay will consider whether it is appropriate to include on investors legally binding labour provisions in BITs, and begins by recognising the different options as to how labour provisions in BITs can be made enforceable. An analysis of the arguments for and against an inclusion of labour provisions in the system of BITs then follows, considering both the current global business environment as well as the specific area of international investment law. The essay will end with a summary and final conclusion.

Part I – The Efficiency of Labour Provisions in BITs

2 The Characteristics of International Investment Law

Before 1990 few investment treaties existed and international investments and dispute settlement between host states and investors were therefore predominantly informal. However, during the last few decades the area of international investment law has witnessed an enormous growth and today consists of thousands of treaties as well as highly formalised systems for the
resolution of disputes.\textsuperscript{12} The impressive growth of this area of law is mainly a consequence of the historic yearning for economic growth by developing countries as well as the importance of foreign investments to mobile multinational firms. It was in order to stimulate international investments that BITs became so focused on investor-protection.\textsuperscript{13} However, despite the massive growth no multilateral treaty on investment law has yet been concluded, hereby resulting in a fragmented system of BITs.

In order to correctly analyse how effective labour provisions in BITs are in protecting workers rights and how they can be improved, it is vital to pay sufficient regard to the context and characteristics of international investment law. Therefore, the history of international investment law, the definition of foreign investment, the fragmented system of BITs and the to international investment law common dispute settlement mechanisms will be explored below.

\section*{2.1 Investor Protection – a Consequence of the Historical Emergence of International Investment Law}

In order to understand international investment law as it currently exists it is necessary to briefly revisit the Colonial period when Western European states began to establish permanent colonies in countries with whom they previously only had traded.\textsuperscript{14} During the nineteenth century, alien property was protected not on the basis of an autonomous standard, but by reference to the domestic laws of the home state. Since foreign investors remained within the jurisdiction of their, as they saw it, more civilised home jurisdiction they also received sufficient guarantees and protection when investing in other countries.\textsuperscript{15} However, when colonialism began to unravel in the late nineteenth century the newly independent states started to challenge that foreign investors were not liable under their domestic laws. The ability to impose domestic laws on residents, including aliens, was seen as an important aspect of sovereignty.

\textsuperscript{12} Collins, \textit{An Introduction to International Investment Law} (2016) 1.
\textsuperscript{13} Ibid 10f.
\textsuperscript{14} Ibid 7.
\textsuperscript{15} Ibid 8.
However, relying on the law of the host country alone entailed a number of risks to the investor, since the host country easily could change the domestic laws after the investment had been made or simply treat foreign investors less favourable compared to domestic investors.\textsuperscript{16} This period of confrontation led to uncertainty about the rules governing international investments and in order to protect their investments abroad the former imperial powers employed a mixture of diplomacy and force, commonly referred to as “gunboat diplomacy”.\textsuperscript{17} Over time the apprehensive view on foreign investments in former colonies led to an increased demand for the protection of investors’ rights in investment-specific treaties.\textsuperscript{18} The reason why the newly autonomous states were prepared to accept such investment treaties was their yearning for true economic independence, in which the creation of investment treaties was seen as a way to attract foreign capital and investments.\textsuperscript{19} The massive growth of BITs thus took place in a climate characterised by concerns for the impacts of decolonisation on business interests and during a time when emphasis was put on the role of the private sector in the process of development and the concomitant positive view on private foreign investments.\textsuperscript{20} The historical developments described above furthermore makes evident that international investment law came into being in order to encourage foreign investments by insulating foreign firms from an uncertain legal environment overseas. Against this background it is no surprise that a system so focused on promoting investments and protecting investors was created.

\textbf{2.2 Foreign Investments}

International investment law deals with the laws governing the investment-related commercial activities of multinational corporations undertaken in foreign states.\textsuperscript{21} In order to analyse and assess the effectiveness of labour provisions in

\begin{flushleft}
\textsuperscript{16} Salacuse, \textit{The Law of Investment Treaties} (2nd ed, 2015) 125.  \\
\textsuperscript{17} Ibid 10.  \\
\textsuperscript{18} Ibid 14.  \\
\textsuperscript{19} Ibid 14.  \\
\textsuperscript{20} Dolzer and Schreuer, \textit{Principles of International Investment Law} (2012) 5.  \\
\textsuperscript{21} Collins, \textit{An Introduction to International Investment Law} (2016) 1.
\end{flushleft}
BITs it is necessary to get an idea of what activities that can be defined as investments in the first place. The definition of investment has expanded over time due to the broad definitions made in the various international investment agreements that exist between states. The trend in modern investment treaties is to define investments with an indicative list of examples rather than an exhaustive and definitive list.\(^22\) For example, the 2012 US Model BIT article 1 states that investment means every asset “that has the characteristic of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”. Using such wide definitions is of value to capital exporting states like the US by having as many investors as possible falling under its scope.

Since the term investment is often defined in an open manner, it is the arbitration tribunals that are left to interpret the concept. The line that needs to be drawn by the arbitration tribunal or the dispute settlement mechanism at hand is whether the commercial activity should be defined as an investment or as trade. Although there are some clear instances of investments, many cases will fall more within the blurry sphere. The *Salini v Morocco* dispute sat forward a set of criteria that however can provide guidance on what activities that constitute foreign investments.\(^23\) The Salini Test required that in order to be defined as an investment the activity must involve a transfer of funds or money, be of certain duration, bring economic contribution to the host state and have the investor participating in the management and risks associated with the project.\(^24\) Although this case can indeed give an indication as to what criteria to consider when defining the nature of the commercial activity, it must be underlined that it is in the end the definition in the investment agreement at hand and the arbitration tribunal that makes the final call. For example, one of the criteria in the Salini

Test, to bring economic contribution to the host state, has been rejected by some tribunals as too ambiguous to constitute a legal obligation.25

2.3 A Fractioned System of BITs

Even though the negotiations regarding the creation of treaties has led to a substantial number of investment treaties being concluded, the results of these efforts have been limited in geographical scope.26 The success of negotiating bilateral agreements together with the desire to promote the flow of capital have however lead to several attempts in creating a global treaty on investments, although concrete results have so far been virtually non-existent. One such initiative took place under the auspices of the Organization for Economic Cooperation and Development (OECD) when negotiations began to establish a Multilateral Agreement on Investment in September 1995.27 While consensus regarding the structure for the agreement was found at a relatively early stage, the more precise substantive content turned out to be harder to find mutual agreement on. Apart from disagreement among the negotiating OECD countries, other parties also contested the negotiations. The developing countries challenged the legitimacy of a forum that did not allow their participation, and many non-governmental organisations questioned that the negotiators had only consulted business interests but no other elements of civil society, such as labour unions or human rights organisations.28 In December 1998, the OECD announced that the negotiations on establishing a multilateral treaty on investments had officially ended.29

The consistent failures in establishing a multilateral investment treaty indicate that disagreement on key issues remains an insurmountable obstacle to any meaningful multilateral agreement. However, a recent development in the evolution of investment treaties is the creation of inter-regional investment

25 See for example, *Quiborax v Bolivia*, Decision on Jurisdiction (27 September 2012).
28 Ibid 120.
29 Ibid 121.
treaties, such as the China-Japan-Republic of Korea Investment Agreement\(^\text{30}\), as well as the more far-reaching development of so called mega-interregional treaties among countries from different regions that together possess significant economic importance.\(^{31}\) Yet, although there today are more than 80,000 multinational companies collectively controlling about a million foreign affiliates, no multilateral or global investment treaty exists within the realm of international investment law.\(^{32}\)

Since the current international investment regime lacks a universal treaty, it is instead characterised by a dominance of BITs; it is estimated that more than 3000 BITs exist worldwide.\(^{33}\) Despite the lack of a central institutional structure, BITs tend to reflect a similar set of approaches and the main substantive rules of BITs are to a large extent similar in content. This is because the already existing treaties have had a significant influence on the new treaties being concluded, and have thus in a continuous manner contributed to increased coherence and uniformity within international investment law.\(^{34}\) The provisions existing in most BITs are the fair and equitably treatment, the most favoured nation treatment, the guarantee to full protection and security and the guarantee from the host state to refrain from expropriation without compensation.\(^{35}\)

2.4 The Underlying Rationales of BITs

Having reviewed the history of investment treaties as well as the current system of BITs, it seems suitable to as a next step seek to identify the objectives underlying this international law-making. Understanding why states conclude BITs is crucial in order to understand how to interpret its provisions and

\(^{30}\) Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment.

\(^{31}\) An example of such an agreement is the ongoing negotiations of the Regional Comprehensive Economic Partnership (RCEP) involving Australia, Japan, China, India, Korea and New Zealand. See also Salacuse, The Law of Investment Treaties (2nd ed, 2015) 122-3.


\(^{34}\) Gazzani ‘Bilateral Investment Treaties’ in Gazzani and de Brabandere (eds), International Investment Law: The Sources of Rights and Obligations (2012) 104.

\(^{35}\) To read more about these in BITs commonly prevalent provisions, see Boie, ‘Labour Related Provisions in International Investment Agreements’ (2012) 9f.
successfully apply them to specific situations. Sometimes the objectives are outlined in the body of the treaty, its preamble or in other related documents. Although the objectives may of course vary somewhat between treaties, there are some objectives that contemporary investment treaties do appear to share. One can here identify three orders of objectives, suitably divided into primary objectives, subsidiary objectives and long-term objectives. Each of these sets of objectives will be addressed below.

2.4.1 Primary Objectives of BITs
Nearly all BITs include two objectives: investment protection and investment promotion. These objectives do not come as a surprise considering the context in which BITs were first developed. The primary motive behind the rapid expansion of investment treaties was, as mentioned above, the desire from investors to invest safely abroad that in turn created a demand for a stable and global legal framework able to protect investments. The desire to invest safely abroad was met by a desire from newly independent colonies to increase investments in order to gain further economic independence, mirroring an assumption that increased investments result in national economic advancement and prosperity. These historical motives have lived on, and thus the conclusions of treaties still aim to provide protection to foreign investors and encourage the flow of capital through foreign investments.

2.4.2 Secondary Objectives of BITs
The secondary objectives of states often vary with different countries depending on, for example, its economic situation, ideology or policy goals. These objectives are furthermore harder to assess since they are not always stated in the treaty and sometimes might even be publicly denied by government officials. However, a few more regularly appeared secondary objectives can be recognised. First, some capital-exporting states seek to through investment treaties encourage

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36 The importance of underlying rationales are emphasised in article 31.1 of the VCLT, stating that such context should be considered in the interpretation of a treaty.
38 Ibid.
investment and market liberalisation within their contracting parties. By facilitating the entry of investments and creating favourable conditions for the operation of investments BITs can be seen to possess the potential to liberalise national economies. Although the BITs themselves generally do not express the goal of investment and market liberalisation specifically, it seems as though those goals are present during the negotiations, especially in the minds of the developed countries.\textsuperscript{41} Second, BITs can be negotiated in order to strengthen the relationship between the contracting parties with the aim of closer economic corporation and increased economic benefits. Third, some developing countries see the treaty as a way of remedying the deficiencies in their own government institutions, since the procedures sat up to avoid arbitrary treatment of foreign investors might over time also result in the avoidance of such arbitrary treatment of their own nationals.\textsuperscript{42}

2.4.3 \textit{Long-Term Goals of BITs}

It should be kept in mind when discussing the underlying rationales of BITs that investment treaties are basically instruments of international relations and could therefore be undertaken in order to further certain long-term goals that might not even be related to the area of investments. Even if BITs for individual investors quite naturally are about investments, it might for a state party as well be about economic corporation or mutual prosperity. In order to fully comprehend the provisions of the treaty it is important to view the treaty text in the light of its long-term goals.\textsuperscript{43}

Usually, a careful reading of the preamble of the BIT could reveal some of these more long-term objectives. For example, the preamble of the 2012 US Model BIT states that the contracting parties agrees that “a stable framework for investment will maximize effective utilization of economic resources and improve living standards” and that they should aim to act in a manner “consistent with the protection of health, safety, and the environment, and promotion of internationally recognized labour rights”.

\textsuperscript{41} Salacuse, \textit{The Law of Investment Treaties} (2nd ed, 2015) 128.
\textsuperscript{42} Ibid 129.
\textsuperscript{43} See art 31.1 in the VCLT.
2.5 The Dispute Settlement Mechanisms

The importance of effective dispute settlement mechanisms becomes clear when considering that the main purpose of investment treaties is to encourage foreign investments through investor-protection. This is because the existence of an effective dispute settlement mechanism resolves disputes and secures payments to injured investors, as well as deters states from disregarding their treaty commitments in the first place. Mechanisms for the resolution of conflicts therefore serve the historic purpose of protecting foreign investors and encourage investments.

In order to establish a stable and rule-based system of international investment law all BITs provide some mechanisms for the resolution of conflicts. Whereas most international treaties only recognise states as participants in the dispute settlement process, BITs are furthermore characterised by a distinctive investor-state dispute settlement system. For example, Article 24 in the US Model BIT allows for both interstate and investor-state arbitrations. Below, interstate consultations and arbitration will first be introduced, followed by an examination of investor-state consultations and arbitration.

2.5.1 Interstate Dispute Settlement Mechanisms

The majority of BITs contain a specific provision on dispute settlement between the contracting states. This provision usually provides that attempts to resolve conflicts first should proceed by negotiation, consultations or other diplomatic means. If the states however prove unable to settle the dispute through diplomatic means, virtually all investment treaties provide states with the right to invoke arbitration in order to settle the conflict. Arbitration can, in short, be said to be a method where the disputing parties agree to submit their dispute to a third party for a final and binding decision made in accordance with agreed-upon norms and procedures. The arbitration process and the authority of the arbitrators are therefore based on agreement between the parties, making consent a

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necessary element thereof. Such consent is generally given beforehand in the
BIT in force between the parties.

The most common arbitration mechanism to which the contracting parties
consent is in international investment law the arbitration facilitated by the
International Centre for Settlement of Investment Disputes (ICSID) under the
ICSID arbitration rules or the ICSID Additional Facility Rules. By handling
most of the disputes within international investments, the ICSID must today be
considered a highly important institution for the resolution of conflicts in this
field of law. In order for the arbitral institutions, such as the ICSID, to have
jurisdiction the states must specifically in writing have consented to be subject to
arbitration under the ICSID arbitration rules or the ICSID Additional Facility
Rules. Apart from the ICSID, other common arbitration mechanisms are the
rules under UNICITRAL or the arbitral institution Stockholm Chamber of
Commerce.

2.5.2 Investor-State Dispute Settlement Mechanisms
BITs generally provide not only states but also investors with a right to invoke
arbitration, although they should first engage in negotiations and consultations
with the host country. If the negotiations however prove unsuccessful, the
investors are allowed to initiate investor-state arbitration directly against the host
state for alleged breaches of the BIT, following the procedural rules as they are
set out in the BIT. For example, if the home state and the host state in the BIT
have given their consent to arbitration under the ICSID Additional Facility Rules,
these rules will also be applied in the dispute settlement process between the

investor and the host state. Foreign investors gain their standing through the consent made by the contracting state parties on the basis of the treaty; the treaty provision is said to contain a unilateral offer to arbitrate made to all foreign investors. When a dispute arises, the request for arbitration is thus seen as an acceptance of the offer.

Investors are granted to bring claims without permission of their home government, to control the entire process and have full entitlement to potential monetary awards. Investment treaties thus manage to afford true and real protection to foreign investors and their investments. Providing investors with such a direct and autonomous right to initiate arbitration against the host state is a characteristic feature of international investment law, and a departure from international law in general. For example, international human rights law generally require that all domestic remedies are exhausted before resort to an international arbitration tribunal can be taken.

It should furthermore be noticed that it is only the private foreign investors that can initiate these investor-state arbitrations, meaning that the host state cannot initiate any claims against the investor directly based on the BIT. The legal reasons why only foreign investors can initiate disputes against the host state are several, the main one being that no current BIT in force contain obligations on foreign investors that can be enforced against them. Another reason is that the ICSID and other forms of arbitrations require the consent of both parties in order for jurisdiction to be established, however investors have not given such consent since they are not a party to the BIT in the first place. Instead the host state has to rely on the domestic legal processes if seeking to initiate claims against the investor.

It is thus evident that in investor-state arbitrations it is the investor that is the holder of the substantive rights, especially since they may resort to the remedies available in the treaty regardless of the view of the home state. It should
however be pointed out that although the investor can be considered as the main beneficiary of the treaty, it does not change the relationship between the state parties of the agreement since the treaty continues to impose obligations on the host state owed to the other contracting state.\textsuperscript{54} Furthermore, due to the existence of two parallel dispute settlement mechanisms, the very same facts can result in two independent disputes; one between the investor and the host state and one between the home state and the host state. These disputes are however to regard as independent from one another, which is underlined by the fact that the home state could express disagreement with the claims of its own investors.\textsuperscript{55}

3 The Labour Provision in the 2012 US Model BIT and its Effectiveness in Protecting Workers Rights

As is evident from the above, current BITs are based on an over 60-year old model focusing on the interests of investors. Therefore, it is no surprise that most of the BITs in force today do not explicitly include labour provisions. The US thus entered new ground in the early 1990s by including labour rights in the preamble to its investment treaties. Labour matters have ever since gained considerable ground, and are today found in most of the world’s Model BITs as well as in a few agreements already in force.\textsuperscript{56} Furthermore, labour matters now go beyond the mere inclusion in preambles by also being included in BITs as actual provisions. The 2012 US Model BIT includes such a labour provision in its article 13.\textsuperscript{57} Since labour provisions similar to article 13 can be found in several BITs it constitutes an appropriate basis for the analysis regarding the efficiency of labour provisions in protecting workers rights.\textsuperscript{58}

\begin{itemize}
  \item\textsuperscript{54} Gazzini, \textit{Interpretation of International Investment Treaties} (2016) 50.
  \item\textsuperscript{55} Ibid 51.
  \item\textsuperscript{56} ILO, \textit{Assessment of Labour Provisions in Trade and Investment Arrangements} (2016) 26-7.
  \item\textsuperscript{57} An excerpt of article 13 can be found in appendix 1.
  \item\textsuperscript{58} See regarding trade agreements, for example, art 16.2.1 in CAFTA-DR and the art 19.3-5 in the TPP. Regarding BITs, see for example \textit{Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement of Reciprocal Protection of Investment} art 13 and \textit{Treaty between the Government of the United States of America and the...
scope of article 13 will therefore be carefully analysed below. First the substantive content of the labour provision in article 13 will be analysed, followed by an analysis of the rationales underlying the inclusion of labour provisions in BITs.

3.1 The Substantive Content of Article 13

3.1.1 Referencing Labour Treaties
The US Model BIT states in article 13.1 that the contracting parties should “reaffirm” their respective obligations as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Right to Work and its Follow-Up. The direct reference of internationally recognised labour standards has potential to constitute a far-reaching obligation concerning labour rights in BITs. This is because these statements, compared to the non-lowering of standards clause explained below, not only address a change of standards but express a specific and defined form of labour standard. However, the reference to the ILO standards as it is made in the US Model BIT fails to set up an effective minimum standard for two reasons. First, merely “reaffirming” obligations under the ILO must be considered a weak reference since it fails to constitute a legally binding provision. Second, since the ILO is generally considered to have low levels of obligations and precision and a high level of delegation, the organisation cannot be relied upon to effectively ensure the enforcement of a domestic minimum standard. Hence, although the reference to the ILO made in the US Model BIT might infuse a sense of responsibility on states when it comes to the assurance of labour rights, it cannot be considered to in itself provide an efficient protection for workers.

3.1.2 Non-lowering of Standards Clause
The non-lowering of standards clause in article 13.2 in the US Model BIT states that the parties should “recognize that it is inappropriate to encourage investment

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by weakening or reducing the protections afforded in domestic labour laws” and that “each party shall ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws where the waiver or derogation would be inconsistent with the [domestic] labor rights…”. In other words, the non-lowering of standards clause sets out that the national protection of labour rights should be upheld by the host state also with regards to foreign investors and their investments, meaning that domestic labour standards are not to be lowered when dealing with foreign investors. Although the clause is legally binding through its requirement on states to “ensure” compliance, it only takes a domestic and comparative approach since it does not make any statement as to what the minimum or appropriate level of labour rights protection is. Such an approach weakens the level of protection offered to workers, as opposed to if a fixed minimum standard were to be given. This is because the usage of domestic labour laws as a benchmark only can be considered sufficient in countries that already have a high level of labour protection, while insufficient or even useless in countries with very low or non-existing labour protection.

3.1.3 Failure to Effectively Enforce Labour Laws and the US v Guatemala Case

Article 13.2 in the 2012 US Model BIT states that each contracting party should ensure that it does not “fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory”. To understand how this section is likely to be interpreted by the parties or by an independent third party, one can consult the case between the US and Guatemala that was handed down about a year ago. Even though the decision is based on CAFTA-DR, which is a preferential trade agreement, it can still provide guidance on the interpretation of article 13.2 in the US Model BIT. This is because the wording of the labour provision concerned in the dispute, article 16.1.2 (a) is nearly identical to article 13.2 in the US Model BIT. Furthermore, even if precedents within the system of international investment law is

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60 In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1 (a) of the CAFTA-DR (United States v Guatemala), Panel Decision (14 June 2017).
considered to lack the binding or strongly authoritative effect common in most domestic legal systems, investment tribunals and disputing parties increasingly rely on the decisions of other investment tribunals when arguing cases and settling disputes. Tribunals thus often find themselves bound to pay due regard to earlier decisions made by international courts and tribunals, especially if there is a solution that has been consistently adopted in a series of cases.

In August 2011, after consultations with the CAFTA-DR Free Trade Commission had failed to resolve the matter, the US requested the establishment of an arbitral panel in order to complain about Guatemala’s failure to conform to its obligations under article 16.2.1(a) with respect to effective enforcement of Guatemalan labour laws. In June 2015 the US and Guatemala presented their arguments in a hearing before an arbitral panel in Guatemala City. By failing to comply with court orders regarding eight worksites and 74 workers and by failing to conduct proper inspections in one instance the panel did find that Guatemala had failed to effectively enforce its labour laws. Hence, labour violations indeed had occurred. The US also managed to prove that all these violations, except for the proper inspection-scenario, had been undertaken in a sustained or recurring way. However, the panel stated that they had not fully proved that these acts or omissions were taken in a manner affecting trade. Therefore, the final outcome of the panel in June 2017 was that the US had not managed to prove that Guatemala had failed to conform to its labour obligations as they are set out in article 16.1.2(a) in the CAFTA-DR. By further examining the panel’s arguments of each pre-requisite one can obtain a further understanding of how article 13.2 in the US Model BIT might come to be

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63 In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1 (a) of the CAFTA-DR (United States v Guatemala), Panel Decision (14 June 2017) 1.

64 Ibid 9.

65 Ibid 143, 195.

66 Ibid 201.
interpreted in the case of a future dispute. Article 16.1.2 (a) in the CAFTA-DR as well as article 13.2 in the US Model BIT require the complaining party to prove that the other contracting party has a) failed to effectively enforce its labour laws b) through a sustained or recurring c) course of action or inaction d) in a manner affecting trade/investments.

The first pre-requisite, requiring the state to effectively enforce its national labour laws, means that the state is compelling compliance herewith. Requiring that the enforcement also must be effective can be seen as a recognition of the different levels of enforcement that exists. Although the exact meaning of effective enforcement will ultimately depend upon the facts and circumstances of the case at hand, there are however some propositions on what constitutes effective enforcement that the panel found to be generally applicable. First, a production of results is what makes enforcement action effective. Second, when labour violations have taken place enforcement authorities should take appropriate action to bring the employer into compliance. Third, enforcement authorities should both detect and remedy non-compliance in a manner that leads to an expectation on other employers to comply with the law.

The panel interpreted “sustained” to mean something consistent and continuous, while “recurring” was interpreted to mean repeating. In other words, sustained or recurring action or inaction means a prolonged or repeated behaviour. Furthermore, the acts or omissions must not only be sustained or recurring, but must also have been taken through a “course of action”. This latter criterion seems like the harder one to fulfil. For a violation to be considered as undertaken through a course of action, the panel stated that there must be a line of behaviour connected by sufficient similarity over time and place, hereby indicating that the similarity is not random but connected. In other words, what needs to be proved in order to suffice to a course of action is an institutional

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67 Ibid 41.
68 Ibid 43-4.
69 Ibid 145.
behaviour rather than isolated or disconnected instances. However, deliberateness or intentionality is not required.

When it comes to the pre-requisite that the violation must be made in a manner affecting trade/investments, it should be noted that it is hard to assess what impact the statements made by the panel regarding article 16.1.2 (a) in the CAFTA-DR will have on the interpretation of article 13.2 in the US Model BIT in the event of a future dispute. This is because one cannot simply assume that the threshold for when trade and investments can be considered affected is the same. However, the panel made some statements of more general character that thus potentially could come to be applied in a dispute regarding article 13.2 as well. First, the panel stated that the complaining party must prove that the relevant corporations through the failure to respect labour laws received a competitive advantage. Such an advantage enables employers that are violating the law to make economic gains at the expense of employers who are complying with the law. A competitive advantage could also affect conditions of competition in international trade or investments, and thus transmit incentives that undermine domestic efforts to recognise and protect labour rights. Of course, however, not every failure to effectively enforce labour laws through a sustained or recurring course of action will result in a competitive advantage; sometimes the effects are too brief, too small or too localised. The panel did alleviate the requirement by stating that it was not necessary to provide precise proof on the received advantages, but that it was sufficient to infer competitive advantage on the basis of likely consequences. Nevertheless, even if the panel stated that they did not require precise evidence on, for example, the exact cost reduction enjoyed by the employer to establish that a competitive advantage had been received, they did require some evidence that the cost reduction in itself could make a difference to the conditions of competition of trade in general.

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70 Ibid.
71 Ibid 48.
72 Ibid 56-7.
73 Ibid 63.
74 Ibid 63.
75 Ibid 156.
therefore yet must be shown that labour cost effects reasonably expected in the light of record evidence are sufficient to confer some competitive advantage that has an effect on trade. Hence, proving that the acts or omissions were taken in a manner affecting trade, and potentially investments if a similar interpretation of the criteria is made, seems like a hard criterion to meet.

Not only did it take more than nine years to conclude the case, but the strict interpretation made by the arbitration panel casts doubts on the effectiveness of labour provisions in both international trade and investment agreements. If such a strict interpretation is followed regarding article 13 in the US Model BIT it limits its reach and hence its effectiveness in protecting workers rights. However, since what is being discussed are labour provisions in BITs within the international investment regime, it does indeed seem appropriate that the labour violations also are clearly connected to investments by having some sort of effect hereon. If there is no requirement of the labour violation to effect investments the scope of BITs will be considerably altered by also taking an active regulatory intent in labour matters per se. It could be argued that such an exclusive protection from labour rights abuses, disconnected from investments by not having any evident effects hereon, might be more appropriately offered in another context than international investment law. However, the panel’s decision to offer alleviation of the evidentiary burden on the party having to prove these effects on trade made the labour provision in CAFTA-DR something more than just a mere illusion, and should therefore also be followed in the interpretation of article 13 and other similar labour provisions in BITs.

3.2 Rationales Underlying the Inclusion of a Labour Provisions
One must differentiate between the objectives underlying the BIT in general and the objectives behind the inclusion of certain provisions found therein. Although the former might affect the latter, one cannot simply assume that they are exactly the same. Analysing the specific objectives behind the inclusion of labour provisions is therefore important, especially since these objectives will affect the interpretation of the labour provision at hand and thus the level of protection.
offered to workers against labour rights violations. The 2012 US model BIT will be taken as a departure for the analysis.

When looking at BITs as a whole, investment protection and investment promotion is clearly the prevalent objectives. Therefore, it is not unreasonable to expect that investment protection and promotion have also played a role in the decision to include labour provisions in BITs. How then can labour provisions be seen to protect and promote investments? Labour laws, just like other regulations, tend to impose administrative costs on employers through, for example, requirements of minimum wages or certain equipment for employees. Failures to effectively enforce labour laws could potentially relieve an employer of such costs, hereby resulting in a competitive advantage for that employer. Labour provisions in BITs could therefore be seen as serving the purpose of promoting fair competition in global investments by preventing social dumping, hence constituting what can be called a fair competition rationale spurred by commercial and economic motivations. Such motivations are clearly in line with the historic development of BITs. Apart from the history of BITs there are however several other factors in the US Model BIT, also common in other BITs, that supports the hypothesis that it is indeed commercial reasons that have spurred the inclusion of labour provisions. First, the labour provision is not enforceable to the same extent as the other investment provisions. If the prioritised purpose actually was to enhance workers rights internationally, it seems likely that the labour provisions would be subject to the same enforcement mechanism as the other investment provisions. Second, labour provisions require that in order for a labour violation to be established, investments between the countries must have been affected. Third, the fact that the non-lowering of standards clause in article 13 does not set out any minimum standard could indicate that what is most important is the equal treatment of investors, rather than actually ensuring and enhancing workers rights globally.

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76 See art 31.1 in the VCLT.
77 See the reasoning made under headline 2.4.1.
78 In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1 (a) of the CAFTA-DR (United States v Guatemala), Panel Decision (June 2017) [56].
However, even though commercial motivations seem to be an underlying reason for the inclusion of labour rights, that is not to say that no other objectives could also have played a role. A lot has happened in the world since BITs were first concluded and increased priority is now given to human rights also in the business sphere. Therefore, it is not unreasonable to assume that the recent trend to include labour rights in BITs is also a reflection of this development. Such an attempt, to ensure and promote fair working conditions around the globe, could be called a universalist labour rights rationale motivated by ideological or ideational reasons. The, although weak, reference to ILO core labour standards in article 13.1 is also an indicator that the inclusion of the labour provision constitutes an actual attempt to embrace a set of values with universalist appeal. Creating coherence between these traditionally separated areas of labour rights and investments also enable both sets of objectives to be achieved through the same policy mechanism.

Different interest groups have also picked up on the new wave of recognising the close relationship between human rights and investments. Therefore, the inclusion of labour provisions in BITs could also be a result of the increased pressure from interest groups demanding the inclusion of some form of social provision. This would mean that the inclusion is intended to placate interest groups, which could be defined as a pressure rationale spurred primarily by political motivations.

Without clear and publically available statements or preparatory work regarding the rationales underlying the inclusion of labour provisions in BITs, it is not possible to once and for all conclude what purposes the inclusion of labour provisions in the US Model BIT and other similar treaties is meant to fulfil. However, one could assume that there in practice exist a number of overlapping rationales for such an inclusion. Since BITs have been designed to promote foreign investments and are rooted in early notions of protection of foreigners, it does however seems reasonable to expect that labour provisions first and

foremost are included in order to safeguard pure investment interests. The main rationale for including labour provisions in BITs would then be commercial and related to the historical interests of protecting investors and promote investments. This, as it seems, commercial predominance does however not per se exclude the existence of other rationales. Rather, it is indeed likely that recent recognitions of the interaction between human rights and investments as well as the increased pressure from interest groups demanding protection for workers have had a great impact on the inclusion of labour provisions as well. Particularly the mentioning of labour rights in the preamble can be seen as signalling intent to conclude the treaty on values distinct from earlier treaty practices. However, it still seems too early to say that one of the main purposes of BITs is to improve working conditions through investments between the contracting parties. Rather, such a rationale seems to exist more on the side of the main and dominant commercial purpose. A commercial main purpose behind the inclusion of labour provisions in BITs will furthermore impact how article 13 is interpreted; the effect probably being a strict and narrow interpretation.

3.3 The Dispute Settlement Mechanisms Applied to Labour Rights Violations in the US Model BIT

The arbitration mechanism in article 24 in the US Model BIT does not apply to the labour provision in article 13. Instead, if a state party wants to make a complaint that the other contracting party has violated article 13 it has to make a written request for consultations with that other state party. The state receiving the request is then obliged to respond within thirty days. Thereafter, the parties should “consult and endeavour to reach a mutually satisfactory resolution”.

There is, however, also a possibility to involve a third party in the settlement process according to article 23 in the US Model BIT, but it is entirely discretionary to do so and it requires the consent of both parties. Furthermore, the decision of the independent party ends up as non-binding. Therefore, the mechanism in article 23 appears weak.

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80 See art 13 in the 2012 US Model BIT.
The dispute settlement mechanisms regarding the labour provision in the US Model BIT is thus diplomatic and informal. Although these types of mechanisms constitute an opportunity for the parties to find mutual agreement on suitable long-term solutions adapted to local circumstances, it is here argued that its diplomatic character results in some clear weaknesses when it comes to offering effective protection to workers’ rights. This is due to several reasons. First and foremost, an informal dispute settlement mechanism lacks enforceability. Second, if violations are found to have occurred, it fails to prescribe any remedies to the workers affected by the violations. The application of such remedies instead comes under the complete discretion of the parties. Third, it can be expected to be a highly politicised process where political reasons and self-interest determine both when to complain and what to complain about. This is however common to all state-to-state dispute settlement processes. An example of how self-interest potentially could impact when labour violations in practice are being complained about is when a multinational corporation, with its head office in home state A, has a subsidiary located on the territory of host state B and the multinational corporation financially benefits on host state B’s failure to enforce its labour laws. The multinational corporation might benefit financially through reduced costs on the host state’s failure to enforce, lets say, minimum wages. Since increased revenues for the corporation also benefits home state A by increasing tax revenues, it can be said to be in the self-interest of the home state not to complain about the labour rights violations. It is only when the violations start to negatively affect the competition between the state parties that the home state can be expected to take action, now making it in its self-interest to ensure competition on fair grounds and abolishing competitive advantages between the two countries. In order for labour rights violations to create an interest to compete on equal grounds, they must be not only grave but also big in numbers. It is thus likely that self-interest together with political considerations result in some cases of labour rights violations not being complained about although they might in fact breach the BIT at hand.81

81 An indication of this could be what appears to be the very limited number of cases concerning
However, a feature of the dispute settlement process in the US Model BIT with positive impact on the protection of labour rights is the high level of transparency that is required herein. Article 10 requires the contracting state parties to make a wide range of laws and decisions publicly available and arbitration proceedings must according to article 29 also be transparent throughout the entire process. Such transparency in turn enables public scrutiny and public pressure, which are both important factors in order to increase the enforceability of the final decision. Article 13 furthermore provides the parties with the opportunity to open up for public participation in the dispute settlement process. Public participation could prove useful to the complaining party since the public could put pressure on the party alleged of labour rights violations to take action. Public participation could also open up the eyes of the arbitrators to other issues that also bear relevance in the proceeding although they are not just purely investment-related. However, the provision regarding public participation is weakened by being discretionary and thus completely up to the participating parties to decide upon.

3.4 Concluding Remarks on the Efficiency of Article 13 in the US Model BIT in Providing Protection to Workers

Even though article 13 makes a reference to ILO standards, simply stating that the parties should “reaffirm” their commitments under the ILO does not in itself ensure a domestic minimum level of worker-protection, especially since neither the ILO provides any effective enforcement mechanisms to their provisions. Furthermore, even if the non-lowering of standards clause do indeed recognise that investments should not be encouraged through a lowered domestic labour protection, the lack of a minimum labour standard means that the domestic protection in practice could be very low or even non-existing. Also, in the light of the US v Guatemala case, it appears hard to establish a violation of article 13.2 that stipulates that the state should enforce its labour laws effectively. This is mainly due to the pre-requisite that requires the complaining party to show that

labour provisions within the sphere of international trade and investments; the US v Guatemala case being the only known.
investments have been effected by the violation. However, such a pre-requisite yet seems necessary within international investment law in order not to utterly alter the scope of BITs in a way currently foreign to the system.

Regarding the dispute settlement mechanism applied to labour rights, its informal and diplomatic character fails to provide efficient protection to workers by lacking in enforceability, not ensuring remedies to the affected workers and enabling political considerations to affect the process. However, positive aspects with the dispute settlement process applied to labour rights violations in the US Model BIT is that it offers a high level of transparency and at least opens up for public participation.

4 Suggestions on the Improvement of Labour Provisions in BITs

Based on the analysis above it appears as though article 13 in the US Model BIT is in need of improvements if it is to provide effective protection to the rights of workers. Suggestions on what improvements that can be made from a substantive and procedural perspective in order to increase its effectiveness will be outlined below.

4.1 Improving Substance

The increasing and widespread use of BITs around the globe provides these treaties with great potential to protect labour rights. However, the regime today appears to be dampened by the commercial focus that overrides all other considerations. It is therefore argued that the purpose of BITs must incorporate a strive to protect worker’s rights not only based on economic motivations, but also on a true acknowledgement of the impact that investments have on workers on the ground. One way to ensure such an acknowledgement is through the inclusion of a clear statement in the preamble that recognises the close correlation between labour rights and investments, and thus also the importance of protecting labour rights within the field of BITs. Instead of, as today, state that
the parties should “desire” to promote internationally recognised labour rights it is therefore recommended that the preamble employ a stronger wording, for example by stating that the objectives of the agreement “should” be consistent with the protection and promotion of internationally recognised labour rights. Underlining the importance of labour rights in the preamble is central since a clear reference to core normative values in the preamble will guide the interpretation and application of the operational provisions in the BIT, hereby giving the provisions a principled judicial meaning.\textsuperscript{82} By providing a context to the interpretation and application in which the importance of investments as a means for improving labour conditions is underlined, labour rights matters are likely to be given more weight in arbitrational disputes. It does not appear likely that the scope of article 13 as a consequence will become excessively broadened, since the wording of article 13 yet requires that the violations are sustained or recurring, taken through a course of action and affects investments. Rather, the claiming party will still, and necessarily so, face numerous challenges when seeking to establish that article 13 has been breached. As was also acknowledged in the \textit{US v Guatemala} case, it should however be possible to make assumptions on the effects of the labour rights violations at hand.\textsuperscript{83} For example, underpaid workers can be expected to result in reduced costs for the employer and hence constitute a competitive advantage. If the underpayments take place with certain severity or with certain duration, it should furthermore be possible to find that the investments between the countries have been affected.

Furthermore, as both the clause regarding a state’s failure to effectively enforce its labour laws and the non-lowering of standards clause only apply with regard to domestic laws, a minimum standard of national labour laws must somehow be ensured if article 13 is to ensure an effective protection for workers. For example, a stronger reference to the labour standards in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up could be made. Some BITs do indeed state that the contracting parties should \textit{strive to ensure}
that domestic labour laws are consistent with internationally recognised labour rights.\textsuperscript{84} The on labour rights ambitious Trans-pacific Partnership Agreement (TPP) makes an even stronger reference by stating that the parties \textit{should} adopt and maintain the rights as they are stated in the ILO in its statues and regulations.\textsuperscript{85} Since the TPP is such an on labour rights ambitious agreement, further inspiration on how article 13 in the US Model BIT as well as labour provisions overall could be improved can be taken from here. For example, the labour chapter in the TPP contain an article stating that the contracting parties should ensure that everyone with a recognised interest in a particular matter have access to independent courts for the enforcement of national labour laws.\textsuperscript{86} The article also states that the contracting state parties should promote public awareness of its labour laws, important if access to justice is to be ensured in practice. Since such provisions have been included in the TPP it does not seem unreasonable to suggest that similar provisions are also incorporated into the US Model BIT.\textsuperscript{87}

If a stronger reference to labour rights is made in the preamble and if a minimum labour standard is set up, the purposes underlying the BIT will be altered and broadened. Potentially, this could turn the investor-friendly and investor-protective agreement into an agreement that also show true concern for workers rights within foreign investments.

\section*{4.2 Improving Procedure}

As have been concluded above, the diplomatic dispute settlement mechanism applied to article 13 is currently not providing effective protection to workers rights. However, one could ask if an application of the arbitration mechanism in

\textsuperscript{84} See, for example, the labour provision in art 6 in the FTA between the US and Jordan, see the \textit{Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area}.

\textsuperscript{85} See art 19.3 in the TPP.

\textsuperscript{86} See art 19.8 in the TPP.

\textsuperscript{87} The reasons underlying its inclusion in trade agreements are applicable to investment agreements as well, see Bolle, Overview of Labour Enforcement Issues in Free Trade Agreements (2016) 2. It should however be noted that the US now has dropped out of the TPP negotiations.
article 24 to labour rights violations would result in increased efficiency of article 13 in protecting workers rights?

The ultimate value with the arbitration process in article 24, that sets it widely apart from the informal and diplomatic mechanism applied to article 13, is its high level of enforceability.\(^8\) For example, the ICSID Convention provides that awards should be enforced in all contracting states like judgements of their own domestic courts.\(^9\) Similarly, awards rendered pursuant to ad hoc investment arbitrations are often treated as foreign arbitral awards as stated in the 1958 New York Convention\(^10\) and are thus enforceable in domestic courts. States also seem to in practice have respected the arbitral process by participating in investor-state arbitrations and by showing willingness to perform the arbitral award.\(^11\) Nevertheless, there are a few instances where particular states have refused to perform the investment treaty awards.\(^12\) Evidence of a few refusals does however not undermine the main point; the arbitration mechanisms established in BITs have proven to be very effective in resolving disputes in a binding way.

In both a diplomatic and an arbitral process pressure and threat of lost or withdrawn investments could be employed when seeking to enforce a decision. However, a key difference between a diplomatic procedure and an arbitral process, that also explains why arbitration must be considered to have a higher level of enforceability, is the independently decided and legally binding decision that comes with arbitration. In a diplomatic procedure where there is no formal and legally binding decision to base subsequent action on, sanctioning the other state party in an attempt to enforce the decision can be considered more politically sensitive and thus less likely to be effective, if at all employed.


\(^9\) See art 54.1 in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).


\(^12\) An example is the notable Sedelmayer case, see Sedelmayer v Russian Federation, Judgement (2002). See also Alexandroff and Laird, Ibid.
The high level of enforceability thus makes article 24 in the US Model BIT a promising mechanism when seeking to increase the protection of worker’s rights within international investments. The application of article 24 in disputes regarding labour violations would also enable that the workers whose rights have been violated are economically compensated. Ensuring that affected workers are compensated must be considered an important aspect in order to achieve justice and to prevent states from violating the law in the first place. To achieve increased effectiveness in protecting workers rights the arbitration settlement mechanism in article 24 can however be further improved. Two changes are suggested in order to make the arbitration process more effective in protecting workers rights: a) guaranteeing that expertise within the area of labour rights is always available and b) ensuring that amicus curiae submissions are always allowed.

Because most investment arbitrators have commercial backgrounds, arbitration tribunals seldom provide expertise on labour rights even when such matters specifically arise. Therefore, it is suggested that BITs require the participating arbitrators to always consult experts or specialised agencies when labour rights issues are raised in the case at hand. It is also suggested that the US Model BIT, as well as BITs overall, always allow amicus curiae participation in arbitration processes. Allowing observers to participate is of great importance since it could assist the tribunal both by offering relevant expertise and by drawing attention to relevant matters that for some reason might not have been pleaded by the parties. Enabling for the public to be involved might also increase the amount of attention that is given to the dispute, hereby supporting public awareness that in turn could be helpful in increasing the enforceability of the decision.

All US trade agreements ever since the North American Free Trade Agreement (NAFTA) have included labour provisions, and these provisions have over time become increasingly progressive by extending to labour rights the

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94 Ibid 506.
same mechanisms of enforcement that earlier only applied to purely investment-related provisions. More recent agreements such as the TPP, the US-Jordan FTA and the four FTAs with Peru, Colombia and Panama have all made their enforcement procedures applicable to its entire labour provisions. CAFTA-DR makes at least part of its labour provision subject to its arbitration mechanism. Taken together, these developments indicate a tendency of treating labour provisions equal to purely investment-related provisions as well as making them increasingly progressive and enforceable. Increasing the enforceability of the labour provision in the US Model BIT and other BITs does against this background not seem like an unrealistic next step.

Part II – The Appropriateness of Including Obligations on Investors in BITs

5 Investor-Obligations in BITs?

While international investment law has indeed recognised that the assets of multinational corporations are to be protected through the conclusion of BITs and through the evolution of customary international investment law, there has been little movement towards the recognition of multinational corporations’ obligations towards the host states in which they operate. Even though labour provisions have imposed obligations on states to take certain measurements, no BIT currently in force contains any directly legally binding obligations for foreign investors. The lack of investor-obligations does not appear surprising considering that the conclusion of BITs originally was based on a notion of

96 Bolle, Overview of Labour Enforcement Issues in Free Trade Agreements (2016) 5.
97 See ch 20 in the CAFTA-DR.
98 Mann, ‘International Investment Agreements, Business and Human Rights: Key Issues and Opportunities’ (2008) 12. Also note that although no BIT in force contain any legally binding investor-obligations, the International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development entails such a provision in its article 14 B.
investment protection and investment promotion. However, the business landscape has changed since the days when BITs first were concluded more than 60 years ago.

A complex question is whether BITs can extend its scope and set out binding obligations for foreign investors. Merely concluding that BITs offer deficient protection to workers is not in itself an answer to the question whether it is a good solution to include investor-obligations within the field of international investment law. Although no BIT currently in force puts binding obligations on investors, there is no legal impediment preventing such an inclusion since the content of BITs is based on the will and intentions of the parties. In order to determine if on investors legally binding labour obligations from a theoretical perspective should be included in BITs, it is however also necessary to examine whether such an inclusion is appropriate considering a) the current global business landscape in which foreign investments take place and b) the characteristics of international investment law including its system of BITs. It should be pointed out that the question of whether it is appropriate to include investor-obligations in BITs in the analysis is distinguished from discussions on its feasibility. Whether imposing labour-obligations on investors is feasible in practice cannot by itself determine whether it is de lege ferenda an appropriate solution to the currently deficient protection of workers within foreign investments.

5.1 Options of Enforceability
In order to analyse the appropriateness of including on investors legally binding labour provisions in BITs, one must be aware of the different options regarding how the provisions can be made enforceable. There are many variations as to how enforcement mechanisms for investors can be elaborated, and the three options provided below are therefore not intended as an exhaustive list. However,
by being the most commonly mentioned in the debate they constitute a good departure for the analysis.\textsuperscript{99}

First, one alternative is simply to continue to use the approach currently applied to labour provisions in BITs. This approach requires that the BIT in its entirety is incorporated into domestic law in order to make its provisions subject to all the judicial enforcement processes of the host state. The investor-obligations regarding labour rights would then not be based on the BIT, but on domestic labour law, meaning that if the host state seeks to initiate a proceeding against the foreign investor it needs to establish jurisdiction domestically. Second, another alternative is to allow the host state to, as a counterclaim, assert that the activities of the investor have resulted in labour rights abuses. Such a solution does not allow the host state to based on the BIT initiate an arbitration process against an investor for labour rights violations, but merely enables counterclaims regarding labour rights violations in already ongoing proceedings that have been initiated by the investor.\textsuperscript{100} If the investor is indeed found to be responsible for labour rights violations, the rights of the investor stipulated in the BIT would be vitiated as a consequence. In practice, the possibility for investors to enjoy the protection offered in BITs would thus be conditional upon their fulfilment of the labour related investor-obligations set out therein. A third alternative, and the most far-reaching, is to include a mechanism that allows the host state to initiate an investor-state arbitral process against the investor for failure to comply with the labour obligations set out in the BIT. In other words, if the investor fails to comply with the labour obligations, the host state can directly based on the BIT initiate an arbitral proceeding claiming damages from the investor.

\subsection*{5.2 Appropriateness of Including Investor-Obligations in BITs}

The current model of BITs developed over 60 years ago, in a political context characterised by fear of the spread of communism and concerns for the impacts


\textsuperscript{100} Ibid.
of decolonisation on business interests. Although economic globalisation was not new in principle at the time, it was not until now that privatisation and foreign investments really took speed.\textsuperscript{101} Considering the context in which BITs were originally concluded, it is no surprise that the agreements became so focused on protecting foreign investors and promoting foreign investments. Whatever its merits at the time, one can question whether the initial model for BITs still meets the needs of the global economy in the 21\textsuperscript{st} century. In order to answer that question it is, as mentioned above, necessary to examine whether investor-obligations regarding labour matters is appropriate considering a) the current global business landscape in which foreign investments take place and b) the characteristics of international investment law including its system of BITs.

5.2.1 Appropriateness with Regards to the Current Global Business Landscape

In order to analyse the current global business landscape one must be aware of the new developments that have taken place since the time when BITs were first concluded. The first BITs were created during a time when globalisation was seen as the one and only way to achieve economic prosperity and development.\textsuperscript{102} However, later research has shown that globalisation also can have adverse effects, which in turn has led the business community to take a more pragmatic view on globalisation. Although still seen as a way to achieve economic and social development, it is thus now generally recognised that economic globalisation also risks leading to unsafe working conditions and underpaid workers.\textsuperscript{103}

With globalisation also came another, significant, change; the increased size and wealth of companies. BITs were developed during a time when international businesses played far less of a role, compared with today when business structures are complex and it is commonplace to operate and invest in

\textsuperscript{102} Ibid.
\textsuperscript{103} It is the pressure in developing countries to become low-cost producers in order to attract foreign capital that risks leading to weakened working conditions and worker rights, see Goldin and Reinert, Globalization For Development (2012) 94.
several countries. This is evident by the fact that some multinational corporations today have revenues significantly larger than the Gross Domestic Product of many states.

While scepticism has been raised against globalisation as an automatic catalyst for economic development and while corporations have continuously grown more powerful, various gross human rights violations involving business actors have taken place at the end of the 20th century and in the beginning of the 21st century. Well-known violations with connection to labour rights and foreign investments are, for example, the Bhopal disaster, the collapse of the Rana Plaza Building in Bangladesh and Shell’s activities in Nigeria. These events directed attention to the close interaction of business and human rights. The increased awareness about corporate responsibility in the business community is furthermore evident through the various international initiatives that have been taken in order to regulate corporate activities, such as the 2011 UN Guiding Principles on Business and Human Rights. That such a nexus between investments and human rights has been recognised by the global business community suggests that international investment law eventually will have to open up to international human rights law.

The increased powers of companies, broadened consensus that globalisation has both costs and benefits and the increased acceptance that labour rights closely relates to investments suggests a new business landscape, in turn creating a need for a reappraisal of the appropriate role and responsibilities of corporations. Putting obligations on investors indeed seems to be in line with recent global developments and can from this perspective therefore be regarded as an appropriate next step.

106 See more about these events in Deva and Nolan ‘The relationship of Human Rights to Business’ in Nolan and Baumann-Pauly (eds), Business and Human Rights: From Principles to Practice (2016) ch 1.3 and 1.4.
5.2.2 Appropriateness with Regards to the Characteristics of International Investment Law

Although it with regards to the current global business landscape seems appropriate to include investor-obligations in BITs, the question however remains whether it is appropriate to include such obligations within the sphere of international investments or whether it should be done somewhere else? Does to corporations legally binding labour standards have a place in international investment law? In order to answer these questions, one must consider the potential effects that investor-obligations could have on foreign investments. It is mainly two negative effects on the flow of investments that have been raised in the debate of investor-obligations: a) disguised protectionism and b) loss of comparative advantage. The former is a fear that industrialised countries in a manipulatory manner will block investments violating human rights with the sole purpose of protecting their industries from competition. However, one could here argue that since only established labour rights violations would fall under the scope of the investor-obligations their potential to also act as mechanisms for protectionism is limited. Merely claiming that labour violations are occurring in order to protect local industries is not sufficient, and in cases where violations can in fact be established such claims must be considered valid even if protectionist purposes might also have played a role in the decision to initiate the proceeding in the first place. Furthermore, it could in the labour provision be included that labour standards should not be used for protectionist purposes.

The latter negative effect mentioned above is related to the economic theory of comparative advantage, dictating that an economic activity will be attracted to the location where it is most efficient.\textsuperscript{108} In the case of labour rights, this means that countries with low labour standards receive a comparative advantage by reducing labour costs for investors. This comparative advantage is vigorously guarded by the developing countries, since they see it as their only chance to

compete successfully with wealthier countries.\textsuperscript{109} However, one can here argue that an advantage derived from a violation of basic workers rights can never be a legitimate comparative advantage, especially not in a business environment that tends to recognise that powerful corporations have a responsibility to comply with human rights. The question here is then rather where the exact line of legitimacy with regards to labour rights should be drawn, however such an analysis falls outside the scope of this essay.

If the two arguments raised above are common objections as to why labour rights obligations on investors \textit{should not} be included in BITs, a strong argument as to why such investor-obligations \textit{should be} included in BITs is the currently existing imbalance between states and investors in BITs. This imbalance arises from the fact that no binding obligations, just rights, are being set out for the investors which sometimes put the state in situations where it cannot impose domestic human rights sanctions or obligations because it would infringe the rights of the investor.\textsuperscript{110} Imposing investor-obligations regarding labour rights could thus result in a better balance between the necessary protection of the foreign firms that have risked exposing their assets to the whims of sometimes unpredictable governments and the legitimate sovereign rights of the host state.

Before making any conclusion regarding the appropriateness of investor-obligations, one must also consider whether it can be regarded as appropriate to put labour obligations both on the host state \textit{and} on the corporation. Traditionally, international investment law has made a clear distinction between rights-subjects on one hand and duty-subjects on the other. However, the emergence of powerful and influential non-state actors on the global arena has come to challenge the notion that only states can be duty-bearers and therefore also the notion that human rights obligations only would apply to states.\textsuperscript{111} Also, there are instances in international law where non-state actors have been imposed

\textsuperscript{109} Ibid. Although concerning trade, the arguments made by the authors have bearing on investments as well.
\textsuperscript{110} Examples of cases where investor-rights have had a limiting effect on the state’s right to regulate are \textit{Metalclad Corporation v United Mexican States}, Award (2000) and \textit{Técnicas Medioambientales Tecmed S.A. v Mexico}, Award (29 May 2003).
with obligations as well, such as rebel forces and separatist movements. Therefore, although the distinction can be considered inherent in the system’s historical and doctrinal basis, it does not constitute any real impediment to the inclusion of on investors binding labour standards in BITs. Complementing state obligations with investor obligations does in fact appear valuable, since domestic mechanisms may not always be enough to ensure compliance with labour laws since some countries lack the sufficient administrative capacities to monitor investor behaviour or to enforce domestic laws. A potential problem, however, is that imposing obligations on both the host state and the investors could create instances where the host state and the corporation are being held accountable for the same labour violations. Situations could then arise where the corporation is required to pay damages to the host state for labour violations connected to their activities while the host state for the same violations is required to pay damages to the home state for violations within its territories. This scenario results in that the damages owed by the host state to the home state at least to some extent are covered by the damages paid by the corporation, with a sense of reduced responsibilities of the host state as a consequence. This could, however, be prevented by making the infringed workers the recipients of the damages of the corporation, while the damages paid by the host state are received by the home state. Another way to prevent the scenario described above could be to use the enforcement mechanism suggested in option two above, since the host state would then not be able to claim damages from the corporation but only to counterclaim that the rights of the investor set out in the BIT does not apply. Seeing corporations not only as rights-holders but also, at least to a limited extent, as duty-bearers seems to better correspond to the current realities of the nature and location of power in the contemporary international system where increased influence has been given to multinational corporations. The increased power and wealth of corporations that have evolved over the last decades, even exceeding the economic capacities of some states, has lead to that corporations

112 Ibid 61.
113 See above under headline 5.1.
today can be seen as well-equipped to safeguard workers rights. The fact that investments is not a single purchase but a long-term establishment could also arguably be seen to increase the responsibilities of the corporation, thus making it reasonable to expect the corporation to ensure that its investments is in compliance with internationally recognised labour laws. Furthermore, since the proposition currently being considered only covers the limited field of labour obligations within global investments, and not the entire spectrum of human rights obligations within corporate activities, ensuring compliance from investors does not seem to be demanding too much.

However, in order to decide whether imposing on investors legally binding labour provisions is appropriate within the international investment regime one must also consider the current fragmentation of the system; can on investors legally binding labour obligations be successfully implemented in the fragmented system of BITs? An argument that can be put forward against the inclusion of investor-obligations in BITs is that the rules governing corporate liability would then vary depending on where the violation occurred due to the many different agreements in force. The fragmented system of BITs thus creates a complexity that is not ideal when seeking to hold multinational corporations legally accountable on the international arena for the first time. Undoubtedly, multilateral treaties have the advantage of establishing a single framework, in turn reducing uncertainty surrounding investment-related disputes, and progressively develop a consistent and predictable body of jurisprudence.114 From a commercial standpoint, such predictability must be considered highly valued. However, while recognising the advantages that comes with imposing obligations on investors in a multilateral treaty, one should not simply be unconditionally hostile to the system of BITs. The main advantage specific to the bilateral system is its flexibility, permitting states to tailor their commitments to their specific needs. Contracting parties may furthermore alter their obligations in order to meet new demands or changed circumstances. The fact that the

agreement needs to be concluded only between two parties furthermore brings changes into the realm of possibility. Although a multilateral treaty indeed offers a more stable and predictable framework, the current system of BITs has witnessed increased coherence and sophistication over time due to the renegotiations of BITs, the elaboration of new Model BITs and the development of a largely consistent body of arbitral decisions.\textsuperscript{115} Also the content of BITs is quite similar, at least with regards to the main substantive rules.\textsuperscript{116} So, although including investor-obligations regarding labour rights in a multilateral treaty is likely to offer more effective protection to workers by ensuring greater global coverage and predictability, BITs should not as a consequence thereof be regarded as an inappropriate avenue. Rather, while awaiting the creation of a multilateral treaty, the inclusion of investor-obligations in BITs seems to be a suitable solution to the currently lacking worker protection within the international investment regime.

5.3 Concluding Remarks on the Inclusion of Labour-obligations on Investors in BITs

The relationship between international investment law and multinational companies is from the outset defined by an anomaly; while corporations are the drivers of investments and the participants in the investment system, only states are generally recognised as duty-bearers under international investment law. It does seem appropriate that a legal system that creates great benefits for corporations engaged in international investments also incorporate obligations concerning how such investments should be conducted with respect to workers rights. Such an approach could harness the potential benefits of international investments when it comes to labour conditions, while at the same time restrain potentially adverse effects on workers. The incorporation of investor-obligations into international investment law as a method to ensure efficient protection of workers rights is therefore not only legally possible, but also appropriate.

\textsuperscript{115} Ibid 103.
\textsuperscript{116} Ibid.
Whether political will can seize this opportunity is however another question altogether.

6 Final Conclusion

It seems clear that article 13 currently fails to provide effective protection for workers against labour rights violations within international investments because of its highly dominant focus on investment protection and investment promotion, lack of any minimum labour standard and its insufficient enforcement mechanisms. Therefore, first, it is recommended that the wording of the preamble is amended in order to broaden the purposes underlying the conclusion of BITs. Second, the arbitration process in article 24 should apply equally to all articles in the agreement, including the labour provision in article 13. Third, expertise in labour rights-related matters should be ensured in arbitral proceedings through a requirement to seek input of experts, and, lastly, arbitration proceedings should always allow for amicus curiae participation. These suggestions are in general applicable to BITs other than the US Model BIT as well.

Furthermore, the fact that international commercial interests can sometimes be separated from the very labour market that fuels it could be considered a major flaw of international investment law. It therefore seems appropriate that BITs, while awaiting the creation of a multilateral investment treaty, also incorporate obligations that ensure that the rights of workers are respected in all corporate investments. The increasing number of BITs that include labour provisions indicates how the promotion and protection of labour rights is becoming an underlying dimension of investment policies, hence giving hope to the future of international investment law. From here, a new generation of BITs can be fostered where labour rights are given centre stage, hereby lifting the futures of all and not merely the fortunes of a few.
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Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment (entered into force 13 May 2012)


*Trans Pacific Partnership Agreement*, signed 4 February 2016 (not yet in force)
Article 13: Investment and Labor

1. The Parties reaffirm their respective obligations as members of the International Labor Organization (“ILO”) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this article, “labor laws” means each Party’s statutes or regulations, or provisions thereof, that are directly related to the following:
   a) freedom of association;
   b) the effective recognition of the right to collective bargaining;
   c) the elimination of all forms of forced or compulsory labor;
   d) the effective abolition of child labor and a prohibition on the worst forms of child labor;
   e) the elimination of discrimination in respect of employment and occupation; and
   f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.